

December 12, 2000

Carol Browner, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

18R-00-R9

Ann Goode, Director
Office of Civil Rights
401 M Street, SW
Washington, D.C. 20460

Re: *The Phoenix Building Trades, Inc. and Don't Waste Arizona, Inc. v Maricopa County Environmental Services Department*

Dear Administrator Browner and Director Goode:

The Maricopa County Environmental Services Department (MCESD) has violated Title VI of the Civil Rights Act of 1964 and the Environmental Protection Agency's ("EPA") implementing regulation, 40 C.F.R. § 7.35, by discriminating on the basis of race in issuing a significant permit revision and otherwise modifying a Title V permit to operate an Arizona Public Service/Pinnacle West combined cycle power plant located at 4606 West Hadley in west Phoenix pursuant to the Clean Air Act ("CAA"). An overwhelmingly Latino community adjacent to the power plant is disproportionately adversely affected, while the power plant serves predominantly white communities.

However, this decision is not an aberration. MCESD's method of administering its air pollution permitting authority pursuant to the CAA has created and perpetuated a system of discriminatory air permitting in the same area. An extraordinarily large number of industrial facilities with a large aggregate of toxic and industrial emissions already disproportionately and adversely affect the subject Latino community. And the Phoenix metro area has been downgraded and designated "serious" for particulate matter (PM10), ozone, and carbon monoxide by USEPA Region 9. While EPA may determine that carbon monoxide and ozone may soon be redesignated as "moderate," the Phoenix metro area has asked for a five year extension to achieve compliance with PM10 requirements because it cannot achieve compliance sooner, if at all.

Repeatedly, poorer communities of color, like this Latino community, have been the designated recipients of disproportionate, dangerous amounts and types of air pollution, bearing a disproportionate share of the county's environmental dangers. This clear pattern of discriminatory impact cannot be ignored by MCESD, and cannot be continued by the issuance of a facility permit to the Arizona Public Service/Pinnacle West combined cycle power plant located at 4606 West Hadley in west Phoenix.

I. PARTIES

A. Complainants

received
12-19-00

This complaint is being filed against MCESD by two organizations with affected members in common: The Phoenix Building Trades, Inc. and Don't Waste Arizona, Inc. The Phoenix Building Trades, Inc. is a trades union that has as members adult residents in the affected area, and it expects to draw upon the children of this area as future members of the union as they mature and enter the workforce. Don't Waste Arizona, Inc. is an environmental justice organization with members in the affected area.

B. Respondent Maricopa County Environmental Services Department

MCESD is the county-level agency that is responsible for implementing, administering, and enforcing the Maricopa County SIP, which includes both Class II permits (non-Title V) as well as federal Title V air pollution permits, and Title VI of the Civil Rights Act of 1964. MCESD, as a recipient of federal funds from EPA, is subject to the requirements of Title VI of the Civil Rights Act.

II. RIPENESS

This complaint comes as a result of a recently concluded permitting process for the Arizona Public Service/Pinnacle West combined cycle power plant located at 4606 West Hadley in west Phoenix. The claim is timely filed since the significant permit revision was issued in late June 2000. (MCESD has still not disclosed the exact date of the issuance of the approval of this significant permit revision, despite specifically asking Dale Lieb, Steve Peplau, and Al Brown of the MCESD for this information.)

III. CONTEXT

The Phoenix Building Trades, Inc. and Don't Waste Arizona, Inc. filed comments in May 2000 in opposition to the proposed significant permit revision to the "existing air permit" at the Arizona Public Service/Pinnacle West combined cycle power plant located at 4606 West Hadley in west Phoenix.

The existing power plant had been operating at the site since 1972. It pre-dated the Clean Air Act, and never has had a real permit. There are no NOx limits on the existing facility. In 1999, the facility reported emissions of over three million pounds of criteria pollutants. With the significant permit revision, it would be allowed to increase its emissions to 4.6 million pounds of criteria pollutants.

The adjacent community (affected area) was established and occupied well before the power plant was ever built, and has always been a low-income and Latino community. The affected area is currently comprised of mostly (70%) Latino, while the 1995 Special Census found that only 21% of Maricopa County residents are Latino. The 1995 Special Census found that 37% of Maricopa County households had incomes of more than \$30,000 per year, while in the affected area, only 3% of households with incomes of more than \$30,000/year. The 1995 Special Census found that the number of children under 5 years old was 33% higher in the affected area than in Maricopa County as a whole. The 1995 Special Census found that 37% of Maricopa County households had incomes of more than \$30,000 per year.

Due to the "serious" designation for PM10 that the Phoenix metro area has, the facility was required to offset its PM10 emissions. To do this, the facility sought to, and was allowed to by MCESD, pave dirt roads in Goodyear, a community within the PM10 nonattainment area, but 15 miles distant. This will do nothing to offset the additional PM10 that this adjacent Latino community will be burdened with.

Both the Phoenix Building Trades, Inc. and Don't Waste Arizona, Inc. filed

comments stating that it is an established scientific fact that an increase in particulate matter in the ambient air correlates to an increase in asthma rates, respiratory illnesses, and premature deaths, and that the issuance of this permit would place an intentional, disproportionate risk to, and disproportionate impact on, the health of the adjacent communities of color.

Further, both the Phoenix Building Trades, Inc. and Don't Waste Arizona, Inc. filed comments stating that there is a difference on the impact on human health between inhaling particulate matter that is a product of combustion and inhaling particulate matter that is merely soil. The control technology to be used at this facility, Selective Catalytic Reduction (SCR), will cause the formation of tons of ammonium salts (ammonium sulfate and ammonium sulfite) that will be released into the ambient air, which will eventually infiltrate the adjacent residences. These ammonium salts are respiratory tract irritants, and exposure will help to induce asthma and chronic obstructive pulmonary disease in those who have chronic exposure.

MCESD is required by federal and state statute to respond to comments before issuing a Title V permit. Sometime in June 2000, MCESD issued the permit for this Arizona Public Service/Pinnacle West combined cycle power plant located at 4606 West Hadley in west Phoenix, but neglected to notify either the Phoenix Building Trades, Inc. or Don't Waste Arizona, Inc., despite the fact that these two organizations were two of the three commenters on the proposed permit. In mid-September 2000, complainants discovered the permit had been issued and complained to EPA, and found out that their right to appeal directly to EPA had been lost due to time constraints written into statute for this type of appeal. MCESD did allow a permit appeal for up to thirty days after complainants received their responsiveness summaries. Complainants filed an appeal in mid-October 2000, and as of yet have not had an opportunity for a hearing their permit appeal, despite the state statute that requires said hearing within thirty days of an appeal. The MCESD has claimed that its Hearing Board does not have the authority to hear appeals based on civil rights violations.

Complainants also discovered that EPA had sent the MCESD a letter in July 2000 to explain the civil rights obligations the MCESD did have in making permit decisions, and suggested a methodology for the MCESD to use in making these types of determinations. EPA suggested the MCESD review EPA's draft civil rights guidance document for delegated programs posted to the EPA website. Indeed, EPA even also suggested as part of MCESD's determination a review of facilities in the same vicinity or area of the power plant that file(d) Form R reports for the Toxics Release Inventory. Complainant Don't Waste Arizona, Inc. also provided a letter to EPA and the MCESD at that time to point out the large number of facilities in the same area that filed under the Toxics Release Inventory, and to point out that EPA's letter had excluded many of the Toxics Release Inventory filers in that subject area.

A recently-released and published, peer-reviewed study from the Arizona State University Office of Environmental Studies reviewed the same TRI data and concluded that there was environmental inequity in precisely the same area as this power plant, even though the enormous amounts of air pollution emitted into the ambient air by the power plant were not part of the study's calculations. The MCESD also has issued and renewed many Class II air pollution permits in the same general vicinity as this power plant, as well as large sources of air pollution that file the TRI reports. And MCESD has a database of the facilities to which it has granted air pollution permits, and therefore has complete knowledge of these permits and the aggregate of the air pollution that is emitted from these permitted other facilities.

A. Title VI

Title VI of the Civil Rights Act of 1964 provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d.

MCESD, a recipient of federal financial assistance from EPA, has violated Title VI as implemented through EPA's regulations by repeatedly issuing Class II and Title V (major source) air pollution permits in this Latino community, although the service areas of this power plant are predominantly white.

EPA must ensure that recipients of EPA financial assistance are not subjecting people to discrimination. In particular, EPA's Title VI regulations provide that an EPA aid recipient "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex." 40 C.F.R. § 7.35(b).

The permitting process is MCESD's method of discrimination, and this process of granting a significant permit revision to the Arizona Public Service/Pinnacle West combined cycle power plant located at 4606 West Hadley in west Phoenix is an extremely egregious example of its discriminatory practices. All complainants must show is that when applied in a particular manner, MCESD's "method of administering its program" yields a discriminatory outcome. As the following sections demonstrate, MCESD's method of administering its air pollution permitting program has resulted in discriminatory impacts throughout this Latino community.

Although MCESD did not solicit the location for this power plant, it "chose" whether or not this power plant can operate in this particular location. In fact, the director of EPA's Office of Civil Rights has written, "the fact that the recipient does not select the site in a permit application does not relieve the recipient of the responsibility of ensuring that its actions in issuing permits for such facilities do not have a discriminatory effect." By issuing Class II and Title V (major source) air pollution permits, MCESD has failed to meet its statutory duties under Title VI.

The effect of MCESD's air pollution permitting process is clear: Latinos and other people of color will bear disproportionate impacts from air pollution. By granting this significant permit revision to Arizona Public Service/Pinnacle West's combined cycle power plant located at 4606 West Hadley in west Phoenix in this predominantly low-income Latino community, when such power plant has a service area which is predominantly white communities, MCESD has administered its program in such a way as to discriminate against people based on race, color, and national origin, in violation of Title VI.

Remedies

In order to provide effective remedies for the patterns of discrimination described in this complaint, the complainants request that EPA:

- require that, as a condition of continuing to provide federal financial assistance, MCESD revoke its approval of the significant permit revision to the Arizona Public Service /Pinnacle West combined cycle power plant located at 4606 West Hadley in west Phoenix; an immediate moratorium on the permitting of any other industrial facilities, whether Class II or Title V, in communities of color;

- withdraw MCESD's authorization to administer the CAA Title V program for regulation of major sources of air pollution until such a moratorium is in place;
- require, as a condition of continuing to provide federal financial assistance, that MCESD withdraw any existing air pollution permits, and cease issuing any new air pollution permits, for new or expanded facilities in communities of color in Maricopa County until it has a competent, credible, scientific method of determining it is not violating the civil rights of communities of color;
- permit complainants to initiate and engage in active, collaborative investigation of the foregoing allegations, including the submission of written interrogatories to MCESD;
- provide complainants with copies of all correspondence to or from the respondent throughout the course of the EPA's investigation, deliberation and disposition of this complaint;
- request MCESD to end its discriminatory countywide pattern of issuing air pollution permits to industrial facilities in communities of color, and that, to this end, request that MCESD use demographic data in considering permit applications;
- sue to compel compliance with the law, to the extent that imposition of the foregoing remedies proves in any way to be ineffectual;
- terminate its assistance to MCESD, pursuant to 40 C.F.R. §7.25, if ADEM fails to implement the above requested changes.

Conclusion

As this complaint makes clear, the low-income, Latino community adjacent to the Arizona Public Service/Pinnacle West combined cycle power plant located at 4606 West Hadley in west Phoenix typifies the communities of color burdened in Maricopa County by disproportionate environmental impacts because of MCESD's permitting process. The discriminatory impact created and sanctioned by MCESD's actions - where power plants with service areas made up primarily of white Maricopa County residents are hosted by Latino Maricopa County residents - is a clear violation of Title VI as implemented by EPA regulations. Because MCESD receives federal funding from EPA, it is subject to Title VI as implemented by EPA regulations. This complaint is timely filed since MCESD took final agency action on this Arizona Public Service/Pinnacle West combined cycle power plant located at 4606 West Hadley in west Phoenix in late June 2000, less than 180 days ago.

We look forward to an active investigation by EPA. The complainants will be filing full documentation of these claims within the next few weeks. Please notify us promptly of the schedule for your investigation. Please direct correspondence to M. David Karnas, Siegel, Bellovin & Karnas, 100 North Stone, 11th Floor, Suite 1105, Tucson, AZ 85701.

Sincerely,

SIEGEL BELLOVIN & KARNAS



M. David Karnas
Attorney for the Complainants